NO. 19-608

IN THE
Supreme Court of the United States

MARK ELSTER and SARAH PYNCHON,

Petitioners,

v.

THE CITY OF SEATTLE,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Washington

BRIEF OF AMICI CURIAE AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS AND ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Seattle's "democracy voucher" program establishes a dedicated property levy used solely to fund individual contributions from Seattle residents to the political campaigns of participating candidates.

The questions presented are:

1. Whether a levy that forces property owners to fund other individuals' campaign donations implicates the First Amendment's compelled-subsidy doctrine.
2. Whether a compelled subsidy of speech should be examined under rational basis review, as the decision below concluded, or whether a higher standard of review is appropriate.

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INTEREST OF AMICI CURIAE[1]

The American Association of Christian Schools is a nonprofit association of state, regional, and international associations working together to provide legislative oversight, to promote high quality Christian education programs, to encourage the goal of producing Christlike young people, and to provide related services to their constituents. AACS serves over 100,000 students and teachers in the United States. Through its legislative oversight efforts, AACS works to protect member schools from government entanglement and to promote religious freedom, Christian education, and family values.

The Association of Christian Schools International is a nonprofit, nondenominational, religious association supporting close to 3,000 Christian preschools, elementary schools, and secondary schools in the United States, and over 20,000 Christian schools in more than 100 countries. ACSI strengthens and equips Christian schools and educators as they prepare students academically and inspire them to become devoted followers of Jesus Christ. Through its efforts, ACSI helps more than 5.5 million students connect to a Christian education. ACSI also works to influence public policy impacting Christian schools and educators and the rights of Christian parents to choose an education that best meets their child's educational and spiritual needs.

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[1] No party other than the amici and their counsel authored any part of this brief or gave money to fund its preparation or submission. All counsel were timely notified of this filing as required by Supreme Court Rule 37.2, and both parties have consented through blanket consents they filed with the Court.

AACS and ACSI submit this brief to highlight the important differences between school vouchers and Seattle's "democracy vouchers," and to encourage the Court to grant the petition and reverse the lower court's decision without undermining this Court's caselaw upholding school vouchers against constitutional challenges.

SUMMARY OF THE ARGUMENT

It is unconstitutional for the City of Seattle to force property owners to subsidize political campaigns and private political speech that the property owners have no interest in supporting. After all, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical." *Janus* v. *Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2464 (2018) (cleaned up). The Court should grant the petition and strike down Seattle's compelled-subsidy voucher program.

In so doing, the Court should clearly articulate why Seattle's so-called "democracy vouchers" are radically different than school vouchers, which this Court has upheld against constitutional challenge. *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002). While both programs give citizens taxpayer-funded vouchers that recipients can use only for specific purposes, parents use school vouchers to pay for school tuition, tutoring, books, school supplies, and other educational expenses. In other words, school vouchers fund education; they do not fund speech.

Seattle's democracy vouchers are very different. The City uses the vouchers specifically to fund political speech: to help Seattle residents "participate in political campaigns" and to have their voices "heard by candidates." App. G-6. Recipients can only use their vouchers to contribute to the political campaigns of eligible candidates. App. G-9. Candidates redeem the vouchers and use the funds for campaign-related expenses, such as advertising, leaflets, and other speech. App. I-8.

So Seattle's democracy vouchers use taxpayer dollars to fund two levels of political speech: (1) the resident's initial campaign contribution, and (2) the candidate's resulting campaign expenditures. As a result, the vouchers implicate—and violate—the First Amendment's Free Speech Clause. That Clause protects citizens against being forced to subsidize other people's private political speech.

In contrast, school vouchers fund education, not speech, and therefore do not implicate the Free Speech Clause. Taxpayers challenging school vouchers often (wrongly) invoke the Establishment Clause, arguing that using vouchers to pay for education at religious schools impermissibly aids religion. But under an Establishment Clause analysis, school vouchers reach religious schools as a result of private choices, not government choices. That is precisely what makes them constitutional.

In sum, school vouchers are constitutional for the same reason Seattle's democracy vouchers are not: private choices save the former (which merely fund education) and doom the latter (which subsidize private political speech). This Court should grant the petition, vacate the lower court's decision, and hold that Seattle's democracy vouchers unconstitutionally force taxpayers to pay for other people's private political speech. School vouchers would survive that holding.

ARGUMENT

I. This Court can strike down Seattle's democracy vouchers without harming school vouchers.

A. Funding educational services is very different than funding someone else's private political speech.

"The education of its young people is, of course, one of the State's principal missions and responsibilities; and the consequent costs will make up a significant portion of the state budget." *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 137 (2011). Taxpayers understand this, and few complain that they are paying to educate children.

Paying for someone else's speech is different. Everyone has a First Amendment right to "refuse to foster" ideas "they find morally objectionable." *Wooley* v. *Maynard*, 430 U.S. 705, 715 (1977). "[T]hat choice is presumed to lie beyond the government's power to control." *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 575 (1995). Compelled speech coerces people "into betraying their convictions." *Janus*, 138 S. Ct. at 2464. And that coercion is "always demeaning" and constitutionally suspect. *Ibid.* Accord *Telescope Media Grp.* v. *Lucero*, 936 F.3d 740, 752 (8th Cir. 2019) (finding likely First Amendment violation where state forced plaintiffs to "speak favorably about same-sex marriage if they [chose] to speak favorably about opposite-sex marriage"); *Brush & Nib Studio* v. *City of Phoenix*, 448 P.3d 890, 904 (Ariz. 2019) (individuals have "autonomy over [their] speech and thus may not be forced to speak a message [they do] not wish to say").

"Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns." *Janus*, 138 S. Ct. at 2464. Whether that coercion stops short of forcing someone "to utter . . . speech" is beside the point. *United States* v. *United Foods, Inc.*, 533 U.S. 405, 413 (2001). As Thomas Jefferson put it bluntly: "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical." *Janus*, 138 S. Ct. at 2464 (cleaned up).

1. School vouchers use taxpayer dollars to fund education—not speech.

Through school voucher programs, parents use "all or part of the public funding set aside for their children's education" to send them to private schools that can better meet their needs. EdChoice, *The ABCs of School Choice: The Comprehensive Guide to Every Private School Choice Program in America* 28 (2019), https://bit.ly/2FmJdm0. "By educating a substantial number of students," these private schools "relieve public schools of a correspondingly great burden—to the benefit of all taxpayers." *Mueller* v. *Allen*, 463 U.S. 388, 395 (1983).

Fifteen states, the District of Columbia, and Puerto Rico have voucher programs. EdChoice, *supra*, at 29–82. And more than 188,000 students used them in 2019. *Id.* at 28. Through eligibility requirements, the programs target low-income students, students at failing schools, students with disabilities, students in military families, and students in foster care. Josh Cunningham, *School Choice: Vouchers*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Dec. 1, 2016), https://bit.ly/39AAfiZ.

School vouchers fund conduct—not speech. *Bagley* v. *Raymond Sch. Dep't*, 728 A.2d 127, 146 (Me. 1999) ("The [plaintiff] parents cannot assert that they have been denied a forum for any type of speech. Rather, they seek to have the State pay for their children's education."). As a result, this Court's compelled-subsidy caselaw does not apply. See, *e.g.*, *Wieland* v. *U.S. Dep't of Health & Human Servs.*, No. 4:13-CV-01577-JCH, 2016 WL 98170, at *6 (E.D. Mo. Jan. 8, 2016) (rejecting plaintiffs' compelled-subsidy claim against the Affordable Care Act's contraceptive mandate because it "regulate[d] conduct, not speech," the conduct was "not inherently expressive," and any resulting speech was merely "incidental").

2. Seattle's democracy vouchers use taxpayer dollars to fund campaign contributions to preferred political candidates—private speech.

Unlike school vouchers, Seattle's "democracy vouchers" fund private political speech. This is by design. The relevant code section hails the vouchers as being "vital to ensure the people of Seattle have equal opportunity to participate in political campaigns and *be heard* by candidates." App. G-6 (emphasis added). Money talks. And the City gives residents four $25 vouchers to contribute to the political candidates of their choice. App. G-6–9. Candidates, in turn, use voucher funds to run and promote their political campaigns. App. I-8.

These voucher-funded campaign contributions are core political speech. When a voucher recipient "contributes money to a candidate, he exercises" his "right to participate in the public debate through political expression and political association." *McCutcheon* v. *Fed. Election Comm'n*, 572 U.S. 185, 203 (2014). "The contribution 'serves as a general expression of support for the candidate and his views' and 'serves to affiliate a person with a candidate.'" *Ibid.* (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 21–22 (1976) (per curiam)). Thus, forcing taxpayers to fund "democracy vouchers" forces them to fund speech, and this Court's compelled-subsidy caselaw applies.

B. Under the Establishment Clause and the Free Speech Clause, different analyses produce different results.

"Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring). As the City and trial court would have it, though, both clauses would be reduced to the *same* test: if voucher programs allow taxpayer funds to reach religious schools or political candidates as a result of true private choice, then the programs must be constitutional. App. D-9. But what works in the Establishment-Clause context produces the exact opposite result under the Free Speech Clause. Upon closer inspection, then, the analogy falls apart.

1. Under the Establishment Clause, private choices insulate school vouchers from attack.

This Court has interpreted the Establishment Clause to mean that a state may not enact a law with "the 'purpose' or 'effect' of advancing or inhibiting religion." *Zelman*, 536 U.S. at 648–49. "A state's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable." *Mueller*, 463 U.S. at 395. That is why school-aid cases often turn on whether the challenged "program nonetheless has the forbidden 'effect' of advancing or inhibiting religion." *Zelman*, 536 U.S. at 649.

"To answer that question," this Court has "drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools *only as a result of the genuine and independent choices of private individuals*." *Zelman*, 536 U.S. at 649 (emphasis added; citations omitted). For example, in *Mueller*, in *Witters* v. *Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), and in *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), this Court "confronted Establishment Clause challenges to neutral government programs that provide[d] aid directly to a broad class of individuals, who, in turn, direct[ed] the aid to religious schools or institutions of their own choosing." *Zelman*, 536 U.S. at 649. In all three cases, this Court rejected those challenges. *Ibid.*

In *Mueller*, this Court "rejected an Establishment Clause challenge to a Minnesota program authorizing tax deductions for various educational expenses, including private school tuition costs." *Zelman*, 536 U.S. at 649–50. The Court "emphasized the principle of private choice, noting that public funds were made available to religious schools 'only as a result of numerous, private choices of individual parents of school-age children.'" *Id.* at 650 (quoting *Mueller*, 463 U.S. at 399–400). These private choices "ensured that 'no imprimatur of state approval [could] be deemed to have been conferred'" on religion. *Ibid.* (quoting *Mueller*, 463 U.S. at 399) (cleaned up).

In *Witters*, this Court "used identical reasoning" to uphold "a vocational scholarship program that provided tuition aid to a student studying at a religious institution to become a pastor." *Zelman*, 536 U.S. at 650. There, too, aid flowed to religious schools only through "genuinely independent and private choices." *Witters*, 474 U.S. at 488. So "the decision to support religious education [was] made by the individual, not by the State," thus avoiding "any message of state endorsement of religion." *Id.* at 488–89.

Finally, in *Zobrest* this Court rejected "an Establishment Clause challenge to a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools." *Zelman*, 536 U.S. at 651. The program "ensured that parents were the ones to select a religious school as the best learning environment for their handicapped child." *Id.* at 652. So once again, private choices broke "the circuit between government and religion," and "the Establishment Clause was not implicated." *Ibid.*

These three cases show why the Court has "never found a program of true private choice to offend the Establishment Clause." *Id.* at 653. When government aid reaches religious schools through the "deliberate choices" of private recipients, *the recipients* are responsible for any "advancement" or "endorsement" of religion—not the government. *Id.* at 652. See also *Mitchell* v. *Helms*, 530 U.S. 793 (2000) (even direct aid to religious schools does not qualify as government support for religion under these circumstances).

Against this backdrop, this Court rejected an Establishment Clause challenge to Ohio's school-voucher program in *Zelman*. 536 U.S. at 653. That program allowed aid recipients "to exercise genuine choice among options public and private, secular and religious." *Id.* at 662. As a result, it was a "program of true private choice, consistent with *Mueller*, *Witters*, and *Zobrest*, and thus constitutional." *Id.* at 653. Accord *Winn*, 563 U.S. at 143 (holding that the "decisions of private taxpayers regarding their own funds" prevented any injuries to other taxpayers "from being fairly traceable to the government").

In sum, under the Establishment Clause, private choice is a key component of a constitutional program. A "neutral program of private choice" breaks "the circuit between government and religion" because "no reasonable observer would think" the program "carries with it the *imprimatur* of government endorsement." *Zelman*, 536 U.S. at 652, 654–55. In the Free Speech context, though, private choice has the exact opposite effect.

2. Under the Free Speech Clause, private political choices doom democracy vouchers.

Under the First Amendment's Free Speech Clause, private conduct is a vice, not a virtue: "Citizens may challenge compelled support of private speech, but [they] have no First Amendment right not to fund government speech." *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005). Accord, *e.g.*, *Rumsfeld* v. *Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61 n.4 (2006) ("military recruiters' speech [was] clearly Government speech," so law schools had no right not to fund it).

The reason for that distinction is simple. When the government speaks or "disburses public funds to private entities *to convey a governmental message*, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (emphasis added). If taxpayers dislike that speech, they have a political remedy: the government is "accountable to the electorate and the political process for its advocacy." *Bd. of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 235 (2000). "If the citizenry objects, newly elected officials later [can] espouse some different or contrary position." *Ibid.*

Not so when the government forces taxpayers to pay for other private parties' speech—especially private political speech. When that happens, "a significant impingement on First Amendment rights occurs" that "cannot be casually allowed." *Janus*, 138 S. Ct. at 2464 (cleaned up).

Janus proves this point. There, this Court held that an Illinois law requiring public employees to subsidize a union "violate[d] the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." *Id.* at 2460. Equally here, Seattle's program requiring taxpayers to subsidize other people's campaign contributions "violates the free speech rights of [taxpayers] by compelling them to subsidize private speech on matters of substantial public concern." *Ibid.* This Court should not leave such "a significant impingement" unchecked. *Id.* at 2464.

II. This case is an ideal vehicle for the Court to highlight the dangers of compelled speech without harming school vouchers.

The First Amendment's Free Speech Clause "is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us." *McCutcheon*, 572 U.S. at 203 (cleaned up). Seattle's voucher program snatches that decision from property owners and places it in the hands of other private persons so they can express their own private political views.

This Court often waits for a circuit split or some other division of authority before taking up a constitutional issue of national importance. But that would be unwise here. It is unconstitutional to rob Peter to pay for Paul's expression of Paul's private political views. And while Seattle's program is the first of its kind, copycat programs are set to proliferate if Seattle's survives. Pet. 31–34 (providing examples).

The confluence of these two circumstances poses a real threat. If this Court does not halt Seattle's unconstitutional program now, others will soon follow. Every political-speech voucher that Seattle and any other government forces taxpayers to fund forces them to pay for someone else's private political speech. These compelled payments distort public debate and, paradoxically, will tend to entrench certain political candidates and platforms. Pet. 34. Accordingly, this Court should grant the petition, vacate the lower court's decision, and hold that Seattle's voucher program unconstitutionally compels taxpayers to pay for other people's private political speech.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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